IN THE

SUPREME COURT OF THE UNITED STATES.

No. 878.

MAYLON B. CLINKSCALES,
Appellant,

vs.

THE STATE OF GEORGIA,
Appellee.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia.

BRIEF FOR APPELLEE IN OPPOSITION.

Commerce, Georgia,
Jefferson, Georgia,
Jefferson, Georgia,
Bank of Georgia Building,
Atlanta, Georgia,

JOHN ACKBAR DARSEY,
H. W. DAVIS,
JACK S. DAVIDSON,
HARRY S. McCOWEN,

Attorneys for Appellee.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Argument	3
Conclusion	7

Cases Cited.

City of Atlanta v. Stallings, 198 Ga. 510 (32 S. E. 2d 256)	3
Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311, 47 L. Ed. 190, 23 Sup. Ct. 123	6
Gordon v. Clinkscales, 215 Ga. 843 (114 S. E. 2d 15)	3
James v. State, 61 Ga. App. 860 (7 S. E. 2d 398)	5
James v. State, 73 Ga. App. 834 (6) (38 S. E. 2d 125)	6
Lynch v. Southern Express Co., 146 Ga. 68 (3) (90 S. E. 527)	3
McIlvaine Patent Corporation v. Walgreen Co., C. C. A. Ill. 1943, 138 F. 2d 177	4
Palmer Oil Corporation v. Amarado Corporation, 343 U. S. 390, 96 L. Ed. 1022, 72 Sup. Ct. 842	6
Price v. Central of Ga. Ry. Co., 124 Ga. 899 (2) (53 S. E. 455)	3
Tilly v. Cox, 119 Ga. 867 (2) (47 S. E. 219)	3, 4
Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678	5
Walton v. Johnson, 213 Ga. 109 (1) (97 S. E. 310)	4

Whitsell v. Alexander, C. A. Ill. 1956, 229 F. 2d 47, Certiorari denied 76 S. Ct. 788, 351 U. S. 932, 100 L. Ed. 1491 4
Wood v. State, 45 Ga. App. 783 (165 S. E. 908) 5
Zucht v. King, 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24 6

Statutes and Rules Cited.

Federal Rules of Civil Procedure, Rule 50 4
Ga. Code Ann., Section 110-104 ..... 2, 3
U. S. C. A., Const. Amendment 7 4
United States Constitution, Amendment 14 4
28 U. S. C. A. 1254 (1) 6
28 U. S. C. A. 1257 (3) 6
28 U. S. C. A., Rules of the Supreme Court, Rule 19 (1) (a) 6
28 U. S. C. A., Rules of the Supreme Court, Rule 19 (1) (b) 6

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 878.

MAYLON B. CLINKSCALES,
Appellant,

vs.

THE STATE OF GEORGIA,
Appellee.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia.

BRIEF FOR APPELLEE IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals of Georgia is reported at 104 Ga. App. 723, and is correctly quoted in the Appendix to the Petition.

JURISDICTION.

The jurisdictional statement as made in the Petition is wholly deficient and inadequate to invoke the jurisdiction of this Court, and, as appears in the argument herein, the authorities there cited are irrelevant and inapplicable.

QUESTIONS PRESENTED.

Contrary to Appellant's statement of the "Questions Presented," the petition does no more and no less than to pose the queries:

1.

Where, in disbarment proceedings, the Respondent, upon timely demand, is granted a trial by a jury, a jury is impaneled, the evidence in support of the charges is concluded, the Respondent elects neither to take the stand in defense of his own character which has been placed in issue, nor to introduce the testimony of any one of his named co-conspirators, and rests his case without the introduction of any evidence of any kind or nature, does the 14th Amendment to the United States Constitution guarantee to the Respondent the right to a verdict at the hands of the jury rather than upon the direction of the court, when such directed verdict is demanded, and represents the only one which would be authorized by the evidence?

2.

Assuming so, in the circumstances where neither any state nor any federal constitutional question in respect thereof was raised in either the trial or the state review courts, and where no determination of any such state or federal constitutional question has been made by any one of such courts, may the jurisdiction of this Honorable Court be invoked through a petition which raises such issue for the first time?

STATUTES INVOLVED.

The Petition fails to set forth the controlling statute codified as Ga. Code Ann., Section 110-104, which provides:

> "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions of inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto."

ARGUMENT

Respectfully suggesting that to each of the queries hereinabove stated a negative answer is required, we submit, argument thereupon *seriatim*.

I.

There has been no denial to Appellant of any right to a trial by a jury. Appellant elected to default in the formulation of any issue of fact for the jury to try.

Contrary to the implications of Appellant's argument, this is not a criminal or quasi-criminal proceeding; nor is it criminal in nature. Such an innuendo is in the teeth of the law of the case as established by the Supreme Court of Georgia in **Gordon v. Clinkscales**, 215 Ga. 843 (114 S. E. 2d 15). See also **City of Atlanta v. Stallings**, 198 Ga. 510 (32 S. E. 2d 256), where such proceedings are denominated civil in character.

Appellant has neglected to call to the attention of the court the basic authority for the direction of verdicts in civil matters as embodied in **Ga. Code Ann.**, Section 110-104, which provides as follows:

> "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions of inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto."

This section has so often been held not to be repugnant to the Constitution of this State or that of the United States, as impairing the right of trial by jury, or as depriving a party of due process of law, as not to be in dispute. **Tilly v. Cox**, 119 Ga. 867 (2) (47 S. E. 219); **Price v. Central of Ga. Ry. Co.**, 124 Ga. 899 (2) (53 S. E. 455); **Lynch v. Southern Express Co.**, 146 Ga. 68 (3) (90 S. E. 527).

Under our procedure,

> "It is the province of the jury, in civil cases, to pass upon questions of fact, and a trial by jury in such cases presupposes an issue of fact; so if there be no such issue, there is nothing for a jury to pass on. The jury, in such cases, has nothing to do with questions of law that may be involved, or with inferences of law from undisputed facts. A plaintiff might with as much reason contend that the court when granting a nonsuit deprived him of his right of trial by jury as . . . (Appellant contends) that he was deprived of such right by the direction of a verdict against him . . . ." **Tilly v. Cox**, supra, 119 Ga. 867, 871.

And, of course, the

> "Contentions of a party in pleadings, unsupported by evidence, are insufficient to make an issue for consideration by the jury." **Walton v. Johnson**, 213 Ga. 109 (1) (97 S. E. 310).

An almost identical parallel obtains in federal civil practice wherein authority for the direction of verdicts is found in **Rule 50, Federal Rules of Civil Procedure.** Under this Rule and prior law it has been consistently held that the trial court should grant a directed verdict when the evidence is such that there are no controverted issues of fact upon which reasonable men could differ, and neither summary judgment nor the direction of a verdict infringe the right of jury trial preserved by U. S. C. A., Const. Amendment 7, where the question is one of law. **Whitsell v. Alexander**, C. A. Ill. 1956, 229 F. 2d 47, Certiorari denied 76 S. Ct. 788, 351 U. S. 932, 100 L. Ed. 1491; **McIlvaine Patent Corporation v. Walgreen Co.**, C. C. A. Ill. 1943, 138 F. 2d 177.

It is equally clear that the 14th Amendment to the Federal Constitution does not guarantee to the accused

any right to a verdict at the hands of a jury in such cases. **Walker v. Sauvinet**, 92 U. S. 90, 23 L. Ed. 678.

On the basis of the foregoing authorities, we respectfully submit that Appellant has not been deprived of any right guaranteed to him by either the State or Federal Constitutions, and that a negative answer is in order to the query first above stated.

2.

Contrary to Appellant's jurisdictional statement, the decision *sub judice* is wholly consistent with the applicable laws of the State of Georgia. It does not represent any departure from the accepted and usual course of judicial proceedings which would afford any basis for the exercise of this Court's power of supervision.

The accepted and usual course in such cases was announced in the case of **Wood v. State**, 45 Ga. App. 783 (165 S. E. 908), wherein at page 790 the court stated:

> "It is not improper for the trial court to direct a verdict in favor of disbarment where such a verdict is demanded by the evidence. **Wernimont v. State**, 101 App. 210 (142 S. E. 194, Ann. Cas. 1913D, 1156)."

The decision under consideration is not in conflict with that of **James v. State**, 61 Ga. App. 860 (7 S. E. 2d 398), as asserted by Appellant. On the contrary it is in complete harmony therewith. In the latter case the Court of Appeals of Georgia had before it the question of the denial by the trial court of the demand of the Respondent for a jury trial, and his trial in lieu thereof by a panel of five judges of the trial court. In reversing the decision of the trial court, the Court of Appeals did no more than to hold that the demand of the accused for a trial by a jury should have been granted.

Appellant has either overlooked or neglected to call to this Court's attention, the decision of the identical court

upon review of the retrial of the identical disbarment case, wherein the Court of Appeals of Georgia held:

> "No issue of fact having been made by the evidence, the court did not err in directing the jury to return a verdict disbarring the respondent." **James v. State**, 73 Ga. App. 834 (6) (38 S. E. 2d 125).

See also the authorities cited in the preceding subdivision.

The decision *sub judice* is wholly consonant with the applicable and controlling law and in nowise departs from any relevant precedent, or the accepted and usual course of judicial proceedings.

Moreover, it appears that Appellant has misconceived the jurisdictional requirements which must be met in order to invoke the jurisdiction of this Honorable Court for the review of state court decisions.

Title 28, U. S. C. A. 1254 (1) and Rule 19 (1) (b) of the Rules of the Supreme Court, Title 28, U. S. C. A., do not represent any authority for the instant petition. Such authorities relate exclusively to petitions for Writs of Certiorari to United States Courts of Appeals.

The authority for review by this Honorable Court of a decision of a state court of last resort by writ of certiorari is found in Title 28, U. S. C. A. 1257 (3) and Rule 19 (1) (a) of the Rules of the Supreme Court, Title 28, U. S. C. A., by virtue of which it would appear academic that it is essential to the invocation of the jurisdiction of this Court that a substantial federal question must have been properly raised in the state court proceedings. **Equitable Life Assurance Society v. Brown**, 187 U. S. 308, 311, 47 L. Ed. 190, 23 Sup. Ct. 123; **Zucht v. King**, 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24; **Palmer Oil Corporation v. Amarado Corporation**, 343 U. S. 390, 96 L. Ed. 1022, 72 Sup. Ct. 842.

As appears from the Petition and the Record, no federal question, substantial or insubstantial, was raised properly, or in any other manner, before the trial court or either of the state review courts, and no one of such courts has made any determination of any such federal question. The decision of the state court is based wholly on non-federal grounds which are independently adequate to support the judgment rendered, and which in no manner involve the resolution of any federal question or the interpretation of any federal statute or constitutional provision.

CONCLUSION.

We respectfully submit that the petition does not present any federal question, is wholly devoid of merit and should be denied.

Respectfully submitted.

.....

JOHN ACKBAR DARSEY,

Address:

Commerce, Georgia.

.....

H. W. DAVIS,

Jefferson, Georgia.

.....

JACK S. DAVIDSON,

Jefferson, Georgia.

.....

HARRY S. McCOWEN,

Bank of Georgia Building,
Atlanta, Georgia.

Counsel for Appellee.